



Gituma & 10 others v Githinji & 2 others (Sued on their behalf and on behalf of Rivai CBO as Chairman, Secretary and Vice Chairman respectively of the Estate of Samuel Gachau Maina) (Environment & Land Case 121 of 2023) [2024] KEELC 4750 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEELC 4750 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT & LAND CASE 121 OF 2023

YM ANGIMA, J

MARCH 7, 2024

BETWEEN

BENJAMIN GAKUO GITUMA & 10 OTHERS & 10 OTHERS & 10 OTHERS & 10 OTHERS PLAINTIFF

AND

PETER KARIUKI GITHINJI 1ST DEFENDANT

MOSES MUNGAI KARIUKI 2ND DEFENDANT

MICHAEL WAINAINA MUKONO 3RD DEFENDANT

**SUED ON THEIR BEHALF AND ON BEHALF OF RIVAI CBO AS CHAIRMAN,
SECRETARY AND VICE CHAIRMAN RESPECTIVELY OF THE ESTATE OF
SAMUEL GACHAU MAINA**

RULING

A. Plaintiffs' Application

1. By a notice of motion dated 14.11.2023 expressed to be filed pursuant to Sections 1A, 1B, 1C and 3A & 80 of the *Civil Procedure Act*, (Cap. 21) and Order 1 Rule 8, Order 40 Rule 51, 2, 3 & Order 51, Rule 1 of the *Civil Procedure Rules*, 2010 and any other enabling provisions of the law applicable the Plaintiffs sought the following orders:
 - a. Spent;
 - b. Spent;
 - c. Spent;
 - d. Spent;



- e. That pending the hearing and determination of this suit, a temporary injunction do issue restraining the 1st – 3rd Defendants by themselves, their agents, servants and/or employees from demolishing structures, harvesting crops, carting away properties and the already demolished houses, subdividing, erecting beacons, constructing structures, selling, leasing out and/or in any other manner dealing with LR. No. Nyandarua/Mawingo Salient/18, 326 and 2017.
 - f. That pending the hearing and determination of this suit a temporary injunction do issue restraining the 4th Defendant by herself, her agents, directors and/or employees from selling, subdividing, charging, leasing out and/or in any other way dealing with the title deed for LR. No. Nyandarua/Mawingo Salient/2016.
 - g. That pending the hearing and determination of this suit the Land Registrar – Nyandarua be ordered to register an inhibition order inhibiting any dealings on LR. No. Nyandarua/Mawingo Salient/18, 2016, 2017 and 326.
 - h. That pending the hearing and determination of this suit, the 1st – 3rd Defendants be ordered to file in court and serve the Plaintiffs copies of the audited accounts for Rivai CBO from the year 2008 – 2023 and copies of the bank statements of Rivai CBO at Equity Bank Ltd.
 - i. That the Plaintiff be granted leave to give notice of the suit to members of Rivai CBO by way of a Public Advertisement through Inooro Radio for 3 days or through notices to be affixed at the Chief's Office Mawingo Location and the Deputy County Commissioner's office at Ol'Kalou.
 - j. That the costs of this application be borne by the Defendants/respondents.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Benjamin Gakuo Gituma on 14.11.2023 and the supplementary affidavit sworn by Sarah Muthoni Kimani on 13.02.2024 and the annexures thereto. The Plaintiffs stated that they were members of a self-help group called Rivai CBO (the CBO) whose membership consisted of 3,048 members. They contended that the members had contributed funds towards the acquisition of the suit properties which were then registered in the names of the 1st – 3rd Defendants as trustees of the CBO. It was contended that the 1st – 3rd Defendants had without the consent of the members sold the suit properties and that parcel 2016 had already been transferred to the 4th Defendant whereas parcel 18 was in the process of being transferred to a company called Terrestra Foods Ltd.
 3. The Plaintiffs further contended that the 1st – 3rd Defendants had in October, 2023 forcibly evicted members of the CBO who had settled on Parcel 18 and demolished their houses. They also complained that the 1st – 3rd Defendants had not accounted for the proceeds of sale of the properties they had sold and that they had failed to hold elections for election of new officials since 2009 in contravention of *the constitution* and rules of the CBO.

B. Defendants' Response

4. The 4th Defendant filed a replying affidavit sworn by Charles Wanyoike Gatithi on 16.01.2024 in opposition to the application. He stated that vide a sale agreement dated 17.02.2022 the 4th Defendant purchased Parcel 2016 from the CBO which was duly represented by its trustees. It was stated that on 09.03.2022 the CBO presented an application for consent to Nyandarua Central Land Control Board (LCB) which application was approved and the relevant consent for transfer issued.
5. The 4th Defendant further stated that it paid the entire purchase price between February and April, 2022 and that the said parcel was duly registered in its name since there were no encumbrances



registered against the title. The 4th Defendant contended that it was a bona fide purchaser for value hence its title and possession should not be disturbed.

6. It was the 4th Defendant's case that the internal leadership wrangles amongst the members and officials of the CBO should not be allowed to interfere with its property rights since at the time of purchase the members of the CBO had amicably resolved their differences and even withdrawn a court case which had been filed in court. It was further contended that at all material times during the sale transaction the CBO was represented by an advocate.
7. The 4th Defendant further stated that Parcel 2016 was sold with vacant possession and that it took possession immediately upon purchase and planted trees thereon as authorized by its board of directors hence it was not involved in the alleged eviction of members of the CBO. The court was consequently urged to dismiss the application with costs.
8. There is, however, no indication of the 1st – 3rd Defendants having filed a response to the application even though they participated in the proceedings by filing written submissions in opposition to the application.

C. Directions on Submissions

9. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their written submissions. The record shows that the Plaintiffs' submissions were filed on 23.02.2024 whereas the 1st – 3rd Defendant's submissions were filed on 05.03.2024. The 4th Defendant's submissions were filed on 05.03.2024.

D. Issues for Determination

10. The court has considered the Plaintiffs' notice of motion dated 14.11.2023, the 4th Defendant's replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following are the key issues for determination herein:
 - a. Whether the Plaintiffs have made out a case for the grant of a temporary injunction.
 - b. Whether the Plaintiffs have made out a case for the grant of an order of inhibition.
 - c. Whether the Plaintiffs are entitled to an order for an account.
 - d. Whether the Plaintiffs should be granted leave to serve notice of institution of suit upon members of the CBO.

E. Analysis and Determination

Whether the Plaintiffs have made out a case for the grant of a temporary injunction

11. The court has considered the material and submissions on record on this issue. The first interim injunction sought was for restraining the 1st – 3rd Defendants from, inter alia, demolishing the Plaintiffs' houses, erecting beacons, leasing, selling or in any manner dealing with Parcel Nos. 18, 326 and 2017. The material on record shows that Parcel 18 was sold to a company known as Terrestra Foods Ltd which was not joined in the proceedings. The court is thus unable to grant any orders with respect to Parcel 18. The court is also not inclined to grant an order for injunction with respect to the other parcels since the Plaintiffs swore that they had been sold as well.



12. The court has noted that Parcel 2016 was sold and transferred to the 4th Defendant way back in 2022 hence the court is not inclined to grant any interim orders with respect to the parcel. The court is not satisfied that the Plaintiffs have demonstrated a prima facie case with a probability of success against the 4th Defendant as the current registered proprietor. Any claims the Plaintiffs may have against that parcel will have to be demonstrated at the trial.
13. Regarding the Plaintiffs' prayer for an order to restrain the 1st – 3rd Defendants from demolishing their houses and structures on Parcel 18, the court is of the view that the actions complained of took place in October, 2023 a month before the filing of the suit and application. A restraining injunction cannot possibly undo what has already taken place since it is a forward looking order. There is no evidence on record to demonstrate that there is any continuing demolition or threatened demolition.

Whether the Plaintiffs have made out a case for the grant of an order of inhibition

14. The Plaintiffs have sought an order of inhibition to prevent any dealings with Parcels 18, 2016, 2017 and 326. As pleaded by the Plaintiffs themselves, those properties were sold by the 1st – 3rd Defendants. There was no disclosure of the identities of the purchasers save for Parcels 18 and 2016. The purchasers of Parcels 2017, 18 and 326 are not before court and they have not been accorded an opportunity of being heard. Thus, the court is not inclined to grant any orders of inhibition to prevent any dealings with the properties at this juncture.
15. The court is reluctant to grant an order of inhibition for at least two reasons. First, the Plaintiffs have declared that the CBO has a membership of about 3,048 whereas the ones opposed to the sale are about 615. The Plaintiffs thus appear to be in the minority. Second, there is evidence on record that some members of the CBO had previously filed a civil suit to challenge intended sale of the suit properties but it would appear that the same was withdrawn after an amicable agreement was reached.

Whether the Plaintiffs are entitled to an order for an account

16. The Plaintiffs prayed for an order compelling the 1st – 3rd Defendants to file in court audited accounts for the CBO for the period between 2008 – 2023 as well as copies of bank statements of the CBO at Equity Bank Ltd. The court is not inclined to grant such an order at the interlocutory stage without the benefit of a hearing. The court has noted that the Plaintiffs have also sought a similar relief in their plaint dated 14.11.2023. It is also doubtful if this court has jurisdiction to grant such a prayer in a dispute amongst members of a CBO given its circumscribed jurisdiction under Article 162(2)(b) of [*the Constitution*](#) of Kenya and Section 13 of the [*Environment and Land Court Act*](#).

Whether the Plaintiffs should be granted leave to serve notice of institution of suit upon members of the CBO

17. The Plaintiffs sought leave to give notice of institution of the suit to members of the CBO by affixing relevant notices at the offices of the Chief Mawingo Location and the Deputy Commissioner's office at Ol'Kalou. They also sought to announce the institution of the suit through Inooro Radio for 3 days. There is no indication on record that the members of the CBO are regular visitors to the office of the Chief and the Deputy County Commissioner. It may not serve any useful purpose to affix notices at such offices if they are unlikely to reach the intended recipients. The court is, however, of the view that a radio announcement at Inooro Radio may serve a limited purpose but the most effective mode would be an advertisement in a newspaper of regional or national circulation. Consequently, the court shall direct that the Plaintiffs shall make both a radio announcement in Inooro Radio as well as a newspaper publication in either the Nation or Standard Newspaper. The size of the advertisement shall not be less than 9 cm by 15 cm.



F. Conclusion and Disposal Order

18. The upshot of the foregoing is that the court finds no merit in the Plaintiffs' application for interim orders save for the leave sought to give notice of institution of suit to members of the CBO. As a result, the court makes the following orders for disposal of the notice of motion dated 14.11.2023:
- a. The Plaintiffs are hereby granted leave to give notice of institution of the suit to members of Rivai CBO by:
 - i. A radio announcement at Inooro Radio for 3 days; and
 - ii. A newspaper advertisement in either the Nation or Standard Newspaper whose size shall not be less than 9 cm by 15 cm.
 - b. The rest of the interim orders sought in the motion are hereby declined.
 - c. Costs of the application shall be in the cause.
 - d. The suit shall be mentioned on 17.04.2024 for pre-trial directions.

It is so ordered.

RULING DATED AND SIGNED AT NYANDARUA THIS 7TH DAY OF MARCH, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

Y. M. ANGIMA

JUDGE

In the presence of:

Mr. Waichungo for the Plaintiffs

N/A for the 1st – 3rd Defendants

Mr. Njuguna for the 4th Defendant

C/A - Carol

